IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 54

THE WHITE MOTOR COMPANY, *Appellant*,

v.

UNITED STATES, *Appellee*.

On Appeal from the United States District Court for the Northern District of Ohio

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF AMICUS CURIAE OF THE SANDURA COMPANY

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TABLE OF CASES

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Sandura Company hereby moves, pursuant to Rule 42.3 of the Rules of this Court, for leave to file a short brief *amicus curiae* in this case. Sandura Company's interest arises from the fact that it is a party in another proceeding presently pending in the Court of Appeals for the Sixth Circuit presenting the same legal issue, that is, whether the use of exclusive territories as a

method of distributing a manufacturer's products is illegal under the antitrust laws. *Sandura Company* v. *Federal Trade Commission*, No. 15,221 (petition filed December 5, 1962).

In its brief filed in the *White* case, the Government urges this Court to adopt a rule of law that all agreements between a manufacturer and dealers of its products which assign dealers exclusive geographical areas are illegal *per se* under the Sherman Act. Obviously such an unlimited legal principle would outlaw the use of exclusive territories by the Sandura Company with its distributors even though their use were demonstrably reasonable and beneficial to competition.

The *Sandura* case in the Sixth Circuit involves a different industry, hard surface floor covering. The structure and distribution patterns of this industry are radically different from those of the automobile and truck industries. The hard surface floor covering industry is dominated by three or four companies. Sandura Company is a very small firm in this industry. The reasons for Sandura Company's adoption of exclusive territories with its distributors and the effects of their use upon industry competition are substantially different from those disclosed in the *White* case. For these reasons Sandura Company urges this Court not to dispose of the *White* case in a fashion that would either prejudge the case in the Sixth Circuit or preclude a consideration by this Court or any other tribunal of the nature, purpose and effect upon competition of the use of exclusive territories by the Sandura Company.

Sandura Company received the final order of the Federal Trade Commission *In the Matter of Sandura*

Company, Docket No. 7042, on October 8, 1962. The delay in filing this motion is due to the fact that the Sandura Company did not file its petition for review to set aside the order of the Commission with the Court of Appeals for the Sixth Circuit until December 5, 1962, which date was after the appellant, The White Motor Company, filed its brief in this case on October 29, 1962. Last week Sandura Company sought, but was not granted, consent of the parties to file an *amicus curiae* brief in this case.

For these reasons we respectfully request that this motion be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE SANDURA COMPANY

THE POSITION OF SANDURA COMPANY

This brief is presented on behalf of Sandura Company (Sandura) which is engaged in the manufacture and sale of vinyl plastic floor covering products.

On January 15, 1958, the Federal Trade Commission issued a complaint against Sandura charging a violation of Section 5 of the Federal Trade Commission Act

(15 U.S.C. § 45).[1] The complaint alleged two violations of Section 5: the use of exclusive territories for distribution and the enforcement of a system of resale price maintenance.

After the conclusion of administrative proceedings, the Federal Trade Commission issued an opinion and final order against Sandura for the alleged violations of Section 5. The final order prohibited Sandura, *inter alia,* from putting into effect any merchandising or distribution plan or policy under which contracts are entered into with dealers or distributors of its products which have the purpose or effect of "restricting the geographical area in which, or the persons or classes of persons to whom, any dealer or distributor may sell such products." In the petition for review filed with the Court of Appeals for the Sixth Circuit, Sandura maintains that this part of the final order is contrary to law and is not supported by the record evidence.

The evidence in that proceeding, we believe, demonstrates conclusively that the use of exclusive territories by Sandura was reasonable and essential for its business survival. The pertinent facts may be succinctly stated as follows:

The hard surface floor covering industry is dominated by three giant firms: Armstrong Cork, Congoleum-Nairn and Pabco, now the Pabco Division of Fiberboard Paper Products Company. These three

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[1] Section 5 in pertinent part provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." (15 U.S.C. § 45) This proscription includes violations of the Sherman Act. See *F.T.C.* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953).

companies control between 77 per cent and 84 per cent of the total industry assets. Another group of competitors consists of large diversified companies such as Johns Manville, Goodyear and Goodrich, which make various types of floor covering in addition to other well-known products. There is a third group of manufacturers made up of relatively small companies, of which Sandura is one.

Sandura has never had more than 1.5 per cent of the total industry assets. It ranks near the bottom of the industry.

In the late 1940's, Sandura, in an effort to compete with the dominant firms, introduced a new type of vinyl plastic floor covering (called "roto-vinyl") under the tradename SANDRAN. Initially Sandura encountered product difficulties, which caused sales to drop sharply from $7 million in 1950 to $3.5 million in 1954. As a result its distributors and dealers either dropped the SANDRAN line or gave up any serious effort to promote it. By 1954 Sandura was insolvent.

Determined to stay in the market, Sandura in 1954 made an all-out attempt to halt the downward sales trend. By late 1954 it had substantially corrected the product difficulties. However, even with the product improvement, Sandura had a critical problem of keeping old distributors and obtaining new ones to handle its SANDRAN line. Insolvent and fighting for competitive survival, Sandura was forced to devise and offer distributors a plan which provided an incentive for them to take on the task of promoting the SANDRAN line and of doing an extensive job of promoting it.

In essence there were two aspects to the distributor problem. Sandura first had to convince distributors

to take on its new product, already tainted by failure, and then it had to get them to pay for the bulk of advertising and other promotional expenses. Traditionally distributors relied upon manufacturers to pay for promotion. The established distributors would not accept the SANDRAN product on these terms, so Sandura had no alternative but to go out and recruit new ones, without prior industry experience. But these prospective distributors would not make the necessary heavy capital investment without some assurance that resulting sales would accrue to them. So in late 1955 Sandura adopted a system of exclusive territorial distributorships.

Under this method of distribution Sandura set up defined geographical areas for its distributors and agreed not to sell to anyone else within the designated areas. The distributors in turn agreed to resell only within the defined areas and to undertake almost complete responsibility for advertising and promoting the SANDRAN line within the geographical areas.

Under this revised distribution plan, Sandura was able to maintain a few of its old distributors and to obtain new distributors. With increased sales promotion by its distributors, the SANDRAN product caught on and sales increased rapidly between 1954 and 1959. But the advantages of Sandura's product innovation proved short-lived. It only had to await the massive assault from the firms that dominate the industry. Armstrong Cork, Congoleum-Nairn and others almost immediately came into the market with matching products. Backed by unlimited resources for advertising and promotion, the sales of these companies soared while those of Sandura fell precipitously. From $24 million in 1959, Sandura sales dropped

drastically to $13.7 million in 1961. While such a decline for a two-year period was truly alarming, the situation was even worse with regard to income. Sandura made $1,027,000 in 1959; in 1961, its net income was $352,000.

This decline was not a temporary development. The last data presented to the Commission showed that for the first five months of 1962 Sandura sales were off another 25 per cent from the corresponding period in 1961. As for income, there was none. For the first five months of 1962, Sandura operated at a net loss, whereas in 1961 it had operated at a net profit.

On the other hand, the industry leaders were forging ahead. Armstrong, for example, increased its sales in 1961 by 4 per cent, an increase, considering its size, that probably represented more than Sandura's total loss of sales. Armstrong's income, too, went up 12 per cent for 1961. The upward movement continued in 1962. For the first quarter of that year, Armstrong sales advanced 5 per cent; its income moved up by 14 per cent.

As these facts demonstrate, Sandura is engaged in another competitive struggle for its very existence. Even with territorial distributorships it is fighting a desperate competitive battle against industrial giants. If anything, such distributorships are needed more now than ever if Sandura is to remain in the market and hold onto its existing distributors. In other words, a flat prohibition against the use of territorial limitations would almost surely bring about the demise of Sandura or at least further seriously weaken it as a competitive factor in this industry. In any event, the net result of any such prohibition would be to impair

rather than to enhance competition in one of the most highly concentrated industries in this country.

Essentially Sandura's position is that exclusive territories must be judged by the standard of reasonableness. In the instant *White* case, however, the Government takes a position that would preclude such an inquiry. In its brief, the Government advocates the application of a *per se* rule of illegality as to all vertical agreements in which a manufacturer limits the territories in which, and the customers to whom, its distributors and dealers may resell its products. For its argument it relies mainly on the analogy that horizontal agreements between competitors to divide territories are illegal *per se* (See Govt. Br., pp. 12-17). Without discussing the flaws of that analogy we point out here only that the analogy is no answer to what is disclosed by the Sandura proceeding: that in the hard floor covering industry at least, there exists a set of business circumstances that justify the use of territorial distributorships as a method of waging competition. Before the Sixth Circuit Sandura will show that its use of such territorial limitations was essential for its business survival and that conditions still exist in the industry which require the continued use of this method of distribution. As stated in the dissenting opinion of the Commission, "not only is it recognized and undisputed that [Sandura] is a relatively small short-line manufacturer of hard-surface floor coverings faced with full line competition from giants around it, but also that it vitally needed to utilize the device of territorially restrictive exclusive dealerships to help it overcome what appeared to be insurmountable problems." (*Sandura Company*, F.T.C. Docket No. 7042, dissenting opinion, p. 2)

The dissent was against the application of any *a priori* rule or absolute principle of *per se* illegality, and urged that the Commission "take a broad perspective and weigh the public interest in the survival" of Sandura. (*Ibid*). "The Commission is with authority and power," the dissent added, "to take into view consideration and action of all aspects of a situation necessary for providing justice." After noting that Congress created the Commission expressly for this purpose, it is stated, "Even our courts in their consideration of problems somewhat similar to the one before us have taken into account and given more weight to the size of the respondents and their need for continuing the challenged acts and practices than it appears the majority did in this case". (*Id.* at 3)

Reference is made to exclusive dealing contracts which Congress has recognized as containing "inherent anticompetitive aspects" but has not made illegal *per se*. (*Id.* at 3-4) This Court, too, has stated time and again[2] that tie-in sales are "inherently anticompetitive" yet it acknowledges that even a "tying device" may be valid when "employed by a small company in an attempt to break into a market". (*Brown Shoe Company* v. *United States*, 370 U.S. 329-30 (1962))[3] Surely Sandura should be permitted the same defense, particularly since, as noted in the Commission dissent (p. 2), "there is a substantial showing in the record that [Sandura] adopted its territorially restrictive exclusive dealerships as an emergency measure to get re-established after coming close to insolvency".

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[2] See also *United States* v. *Loew's Inc.*, 31 Law Week 4001, 4004 (1962); *Northern Pacific Railway Company* v. *United States*, 356 U.S. 1, 6 (1958); *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 25 (1957).

[3] See also *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd.* 365 U.S. 567 (1961).

We do not propose to argue here the relevant law that supports the use of the standard of reasonableness for determining the legality of exclusive territories under the antitrust laws. We are aware that this brief is being filed at a late stage of this proceeding, and we do not wish to make arguments which would require extensive responses by the parties. Our purpose, instead, is to draw to the attention of this Court the existence of the *Sandura* appeal in the Sixth Circuit. The *Sandura* case, we believe, forcefully demonstrates that business circumstances may exist which justify the use of exclusive territories for the strengthening rather than weakening of competition.

CONCLUSION

For these reasons, we respectfully request that this Court, in disposing of the *White* appeal, avoid adopting any broad proposition of law which would prejudge the *Sandura* appeal or which would preclude a later showing, either in this Court or elsewhere, that the use of exclusive territories is a lawful method of distribution when used for a reasonable business purpose with the effect of promoting competition.

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